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No. 88-1498

In The

Supreme Court of the United States

October Term, 1988

BOX OFFICE, INC., a Missouri Corporation, and DAVID JOHN HECKLER,

Petitioners,

v.

STATE OF MISSOURI, ex rel., WILLIAM L. WEBSTER, Attorney General,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED FOR REVIEW

Although Respondent is generally satisfied with the Petitioners' Presentation of the Questions for Review, typographical errors have apparently occurred:

A. In Petitioners' question number 2, Section 407.020(1) was apparently intended instead of "Section 404.020(1)," the corrected question reading:

> 2. Whether Missouri's Merchandising Practices Act, Mo. Rev. Stat. Section 407.020(1), on its face and as construed and applied denies petitioners freedom of speech and press and due process of law in violation of the First and Fourteenth Amendments to the Constitution and subjects petitioners to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution.

B. In Petitioners' question number 3, 28 U.S.C. 1257 was apparently intended instead of "28 U.S.C. Section 1259," the corrected question reading:

> 3. Whether the Missouri Supreme Court's denial of petitioners' petition for writ of prohibition is final within the meaning of 28 U.S.C. Section 1257.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ADDITIONAL PERTINENT STATUTES 1

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 6

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI 7

I. The Petitioners cannot properly invoke the First and Fourteenth Amendments in defending this action 7

II. The Missouri Merchandising Practices Act, including Sections 407.020 and 407.469, is constitutional, both facially and as applied 10

III. The Missouri Supreme Court Denial of Petitioners' Writ of Prohibition is not a "final judgment or decree." Therefore, the United States Court is without jurisdiction to hear this matter 15

CONCLUSION 17

RESPONDENT'S APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Bose Corp. v. Consumers Union of U.S., Inc. 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed 2d 502 (1984) 16

Central Hudson Gas v. Public Service Com'n. of N.Y. 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980) 7

Cox Broadcasting Corporation v. Cohn 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 2d 328 (1975)..... 6, 15, 16

Federal Trade Commission v. Sperry And Hutchison Company 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed. 2d 170 (1972) 12

Gertz v. Welch 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed 2d 789 (1974)..... 7

In re RMJ 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed 2d 64 (1982) 7

New York Times Co. v. Sullivan 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) 16

Riley v. National Federation of the Blind of N.C. 108 S.Ct. 2667, 101 L.Ed 2d 669 (1988).....6, 10, 11, 13, 14

State ex rel. Danforth v. Independence Dodge, Inc. 494 S.W. 2d 362 (Mo. App. 1973) 12

State ex rel. Webster v. Areaco Inv. Co. 756 S.W. 2d 633 (Mo. App. 1988)..... 12

VA. ST. BD. of PHARM. v. VA. CIT. CONS. COUNCIL 425 U.S. 748, 96 S.Ct. 1817 .....7, 14

Village of Schaumberg v. Citizens, Etc. 111 U.S. 620, 100 S.Ct. 826, 63 L.Ed 2d 73 (1980) 11

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

15 U.S.C. 45 ..... 2, 12

28 U.S.C. 1257 ..... 3, 6, 15

Merchandising Practices Act, Missouri Revised Statutes, 1986, Section 407.020 ..... 3, 5, 6, 10

Merchandising Practices Act, Missouri Revised Statutes, 1986, Section 407.100 1

Merchandising Practices Act, Missouri Revised Statutes, 1986, Section 407.472 1

Merchandising Practices Act, Missouri Revised Statutes, 1986, Section 407.453 3

Merchandising Practices Act, Charitable Solicitations, Missouri Revised Statutes, 1986, Section 407.469 ..... 1, 6, 10, 13, 14

First Amendment to the United States Constitution 7

ADDITIONAL PERTINENT STATUTES

In addition to the Constitutional Provisions and Statutes presented by Petitioners, this case also involves the following:

1. Charitable Solicitations, Missouri Revised Statutes, 1986:

407.469. Disclosure of fund-raising costs and use of professional fundraiser.

2. Whenever a solicitation of funds on behalf of a charitable organization is undertaken by a professional fundraiser, the professional fundraiser shall disclose that fact to prospective contributors.

2. Charitable Solicitations, Missouri Revised Statutes, 1986:

407.472.

2. Whenever it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any method, use, act, or practice declared to be unlawful by [section 407.469], he may bring an action pursuant to section 407.100 for an injunction prohibiting such person from continuing such methods, uses, acts, or practices, or engaging therein, or doing anything in furtherance thereof. In any action brought by the attorney general under this subsection all of the provisions of sections 407.100 to 407.140 shall apply thereto.

3. Merchandising Practices Act, Missouri Revised Statutes, 1986:

407.100. Injunction – temporary restraining orders – receivers – restitution, when – civil penalty – venue. – 1. Whenever it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be

unlawful by this chapter, he may seek and obtain, in an action in a circuit court, an injunction prohibiting such person from continuing such methods, acts, uses, practices, or solicitations, or any combination thereof, or engaging therein, or doing anything in furtherance thereof.

2. In any action under subsection 1 of this section, and pursuant to the provisions of the Missouri Rules of Civil Procedure, the attorney general may seek and obtain temporary restraining orders, preliminary injunctions, temporary receivers, and the sequestering of any funds or accounts if the court finds that funds or property may be hidden or removed from this state or that such orders or injunctions are otherwise necessary. . . .

4. The court, in its discretion, may enter an order of restitution, payable to the state, as may be necessary to restore to any person who has suffered any ascertainable loss, including, but not limited to, any moneys or property, real or personal, which may have been acquired by means of any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter. It shall be the duty of the attorney general to distribute such funds to those persons injured. . . .

6. The court may award to the state a civil penalty of not more than one thousand dollars per violation;

4. Federal Trade Commission Act, 15 U.S.C. 45(a)(1):

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

5. 28 U.S.C. 1257; State Courts; Appeal; Certiorari:

Section 1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treatis or laws of the United States,

6. Merchandise Practices Act, Missouri Revised Statutes, 1986:

Section 407.020(1). The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with *the sale or advertisement of any merchandise in trade or commerce or* the solicitation of any funds for any charitable purpose, as defined in Section 407.453, in or from the State of Missouri, is declared to be an unlawful practice. (Emphasis added)

7. Section 407.453, Missouri Revised Statutes, 1986:

407.453. Definitions. – . . .
(2) "Charitable purpose", any purpose which promotes, or purports to promote, directly or indirectly, the well-being of the public at large or any number of persons, whether such well-being is ingeneral or limited to certain activities, endeavors or projects;

STATEMENT OF THE CASE

The Petitioners' Statement of the Case correctly indicates that Respondent, the State of Missouri, filed an action in the St. Louis County Circuit Court seeking to enjoin defendants from soliciting residents of the State, in

an allegedly fraudulent manner. The State's petition found fault with the Petitioners' telephone solicitation script (Petition for Writ of Certiorari, p. 6), rebuttals (Respondent's Appendix D, hereinafter R.A., D) and numerous additional aspects of Petitioners' conduct (see R.A., A for excerpts from the State's petition). The action was brought on December 22, 1987 by the State of Missouri. The State's investigation included undercover employment obtained by two State employees. Respondent's Appendix E contains excerpts from a training session conducted by Petitioner Heckler and recorded by a state investigator. Petitioner Heckler announced to his employees that "We are not a charitable organization." (R.A., E).

Also incorporated by reference as part of the State's initial pleading was the contract by which Petitioners agreed to conduct solicitations on behalf of various 3rd parties, including the Vietnam Veterans Leadership Program (VVLP). Portions of this contract have been attached hereto (R.A., C). The contract provides that a 3rd party (e.g., the VVLP) would receive less than 20% of the total amount contributed by persons solicited. The contract also indicates that the Petitioners' enterprise is "non-charitable" and "conducted for profit."

The Statement of the Case of Petitioners is peppered with "facts" which are not of record in any court. The Respondent does not admit that the VVLP is having problems raising money; that the VVLP received any proceeds as a result of Petitioners' solicitations; that the variety show was "annual", or that it was for "special and less fortunate children"; that the solicitors raised funds for the VVLP; that the solicitation conducted by Petitioners was a "charitable" solicitation; or that the "executive director" of the VVLP "found both the solicitation

and the show appropriate." In fact, results of the investigation conducted by the State of Missouri conflict with many of the Petitioners' assertions. Such matters of "fact" are not of record, not undisputed, and better left to the finder of fact at time of trial.

Petitioners claim that after filing their motion to dismiss, they "demonstrated in detail" that their solicitation was justified pursuant to various decisions of this Court. The presence of this controversy before this Court suggests otherwise. Petitioners have omitted a very relevant portion of § 407.020, RSMo 1986. See the emphasized section in Additional Pertinent Statutes at page 3. At this point in the litigation, Respondent is not prepared to stipulate that Petitioners were promoting, or even purporting to promote, a charitable endeavor.

Petitioners fail to acknowledge the existence of Section 407.469, RSMo 1986; the State has alleged that Petitioners failed to disclose their professional fundraiser status to persons solicited, in violation of that statute. Also absent from the Petition for Writ of Certiorari is acknowledgment of the existence of Section 407.100 RSMo 1986, under which the State seeks relief (see *Additional Pertinent Statutes*, for the text of the listed statutes). At the trial court level, the State has requested injunctive relief, restitution, civil penalties and other appropriate orders.

The Petitioners filed a motion to dismiss, which was denied by the trial court on November 2, 1988. On that same date, Petitioners (defendants) were ordered to answer long-pending discovery. Petitioners responded by petitioning for Writs to the Missouri Court of Appeals, the Missouri Supreme Court, and, presently, the United States Supreme Court.

SUMMARY OF ARGUMENT

1. The decisions of the Missouri Trial and Appellate Courts are not in conflict with any decision of this Court, i.e., the Respondent's cause of action is allowed, *and encouraged,* by *Riley v. National Federation of the Blind of N.C.*, 108 S.Ct. 2667 (1988).

   a. False and misleading speech has never been protected by the First Amendment to the United States Constitution.

   b. State fraud laws, such as Section 407.020, RSMo 1986, serve as the appropriate and constitutional means of deterring and punishing fraudulent and deceitful solicitations.

   c. Section 407.469, RSMo 1986, constitutionally requires a solicitor to disclose its professional fundraising status to prospective contributors, as clearly stated in *Riley*.

2. The denial of the Petition for Writ of Prohibition by the Missouri Supreme Court did not constitute a "final judgment or decree" according to the letter or spirit of 28 U.S.C. 1257. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

3. Respondent has a right to proceed to trial, and to submit this case to the trier of fact, in order to determine whether Petitioners' solicitation program is fraudulent, deceitful or misleading.

ARGUMENT – REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Petitioners cannot properly invoke the First and Fourteenth Amendments in defending this action.

This Court has never given any constitutional protection to false or misleading speech; four United States Supreme Court cases make this proposition abundantly clear:

> "There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."

Gertz v. Welch, 418 U.S. 323, 340 (1974)

> "Untruthful speech, commercial or otherwise, has never been protected for its own sake."

VA. ST. BD. of Pharm. v. VA. CIT. CONS. COUNCIL, 425 U.S. 748, 771 (1976).

> "The First Amendment's concern for commercial speech is based on the informational function of advertising. . . . Consequently, there can be no constitutional objection to the repression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it . . . or commercial speech related to illegal activity."

Central Hudson Gas v. Public Service Comm'n. of N.Y., 447 U.S. 557, 563 (1980).

> "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading

> or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely."

In re RMJ, 455 U.S. 191, 203 (1982).

Petitioners spend considerable time and effort trying to convince this Court that the Vietnam Veterans Leadership Program is a legitimate, benevolent entity. Such an effort misses the point. No alleged charity, no matter how deserving or desperate for money, is entitled to defraud or deceive members of the public in order to obtain donations.

The action by the State of Missouri (Respondent) was filed in response to large scale solicitation efforts by Petitioners. The State has alleged numerous types of violations of the Missouri Merchandising Practices Act, Chapter 407, RSMo 1986 (R.A., A).

The State of Missouri has, in its extensive pleading, alleged that the solicitation of Petitioners is fraudulent, deceitful and misleading. The troublesome nature of the Petitioners' solicitation (reprinted in the Petition for Writ of Certiorari, pp. 6-7) is put into focus when directly compared to the following composite of the solicitation, constructed by reference to the State's allegations:

> Hello Mr. & Mrs. ___. This is (solicitor name). I am employed by The Dajeck Company, and I work as a professional fundraiser.
>
> I am not a veteran; nor am I a volunteer for the Veterans. However, the Vietnam Veterans Leadership Program has agreed to allow us to use its name in this solicitation. Of the money you are about to give me, the Veterans will receive less than 20 cents of

each dollar. More than 80% of the money you might contribute goes to the benefit of various for-profit entities.

The VVLP is also allowing us to use its name in connection with a show which will occur on June 30, 1988 at a local establishment having a seating capacity of 1400. The small travelling group of for-profit performers and all other show expenses will be paid for by you and other persons we solicit. The preparations for this "show" are minimal; the entertainers simply travel the North American Telemarketing circuit across the country, giving "Annual" shows continually, several times a year in many cities. Although we hope to sell $4,000,000.00 worth of tickets for this St. Louis show (at slightly less than $4.00 per ticket), we will be surprised if more than a few hundred persons attend.

If you choose to buy tickets, and if you return the tickets to us, chances are virtually nil that your tickets will reach any children's organization, much less that they will bring children to our show. To successfully bring "special and less fortunate children" to outside events, transportation and supervision are required for the children's convenience and safety. We will provide neither.

We are not a "charity" nor do we seek "donations." Our contract with the VVLP provides that this solicitation is part of a profit-generating enterprise, a factor you may want to consider prior to deciding the amount of money you will be sending to us.

Be advised that children do not receive any of the money you give to us. Now, how much money are you willing to send to us today?

A comparison between the two versions of solicitation obviously indicates a great disparity. The state has alleged that the magnitude of the disparity indicates that fraud, deceit, material omissions of fact and misleading

information permeate the version of the pitch admittedly used by Petitioners.

The injustice perpetrated by the Petitioners is best appreciated by looking at the sales pitch as a whole and by putting oneself in the shoes of a consumer receiving such a solicitation at home, over the telephone. Petitioners' polished solicitation succeeds in gaining contributions from some of the people, much of the time; Petitioners wouldn't be in business if it didn't. The State has alleged, in effect, that the Petitioners have systematized their fraud, hiding it among cliches, stock phrases and canned rebuttals.

Fairness requires that the pitch be judged by its broad impact. The damaging effects of the pitch are quite real, and require the intervention of the State. Once informed of the truth, the State alleges that the thousands of Missouri citizens who have given their hard-earned money to Petitioners would undoubtedly wish that their money could have gone, instead, to worthier causes. The State asks only for a chance to prove in the trial court that Petitioners' entire program, including the solicitation, rebuttals (R.A., D) and solicitor training (R.A., E), is undeserving of First Amendment protection, and amounts to a fraud.

II. THE MISSOURI MERCHANDISING PRACTICES ACT, including Sections 407.020 and 407.469, is constitutional, both facially and as applied.

Contrary to suggestions by Petitioners, *Riley v. National Federation of the Blind of N.C.*, 108 S.Ct. 2667

(1988), did not discourage prosecution of fraud by state governments:

> [T]he State may vigorously enforce its anti-fraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements . . .

Riley, 108 S.Ct. at 2679.

Though the *Riley* court did strike part of the N.C. Charitable Solicitations Act, the stricken portions did not resemble the portions of the Missouri Merchandising Practices Act attacked by Petitioners. In fact, the *Riley* Court went out of its way to encourage anti-fraud law enforcement:

> In striking down this portion of the Act, we do not suggest that states must sit idly by and allow their citizens to be defrauded. North Carolina has an anti-fraud law, and we presume that law enforcement officers are ready and able to enforce it.

Riley, 108 S.Ct. at 2676.

The State of Missouri is doing exactly what is suggested by the *Riley* Court. The Merchandising Practices Act *is* Missouri's anti-fraud law. Without its existence and applicability, Missouri consumers would be defenseless against the innumerable con artists who visit every state and the District of Columbia. See also *Village of Schaumberg v. Citizens, Etc.,* 100 S.Ct. 826 (1980):

> "Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly."

Village of Schaumberg, at 836.

Without suggesting an alternative remedy to the Missouri Merchandising Practices Act, the Petitioners complain that its language is "indefinite" and that it lacks "guidelines."

Consumer protection statutes, of necessity, must be flexible. In *Federal Trade Commission v. Sperry and Hutchinson Company*, 92 S.Ct. 898 (1972), the United States Supreme Court concluded that Congress had not enumerated a list of specific prohibited acts in the Federal Trade Commission Act because to do so would be useless and would only open the door for inventive deceivers to find loop holes in the FTCA. Therefore, 15 U.S.C. Section 45 (a)(1) *constitutionally* states:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Likewise, the Missouri State Judiciary has spoken with regard to the Merchandising Practices Act:

> The purpose of these statutes is to supplement the definitions of common law fraud in an attempt to preserve fundamental honesty, fair play and right dealings in public transactions. In order to give broad scope to the statutory protection and to prevent ease of evasion because of overly meticulous definitions, many of these laws such as the Missouri statute "do not attempt to define deceptive practices or fraud, but merely declare unfair or deceptive acts or practices unlawful", leaving it to the court in each particular instance to declare whether fair dealing had been violated.

State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W. 2d 362, 368 (Mo. App. 1973). See also *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W. 2d 633 (Mo. App. 1988), for the

proposition that Chapter 407 is to be given broad scope to prevent evasion because of overly meticulous definitions.

The State of Missouri has not, could not, and should not draft a statute to specifically prevent the particular types of conduct alleged in its lawsuit against Petitioners. Consequently, the attempts by the Petitioners to hide behind the Constitution of the United States are inappropriate. The unrealistic, over-restrictive, super-technical enforcement scheme which Petitioners apparently seek would serve only to fling open the doors of this State to the undeniably existing hordes of scam technicians.

Petitioners fail to mention Section 407.469(2), RSMo 1986, which requires that they announce their professional fundraiser status:

> "Whenever a solicitation of funds on behalf of a charitable organization is undertaken by a professional fundraiser, the professional fundraiser shall disclose that fact to prospective contributors."

The *Riley* Court gave its stamp of approval to such a requirement:

> The Act, as written, requires the fundraiser to disclose his or her employer's name and address. Arguably, this may not clearly convey to the donor that the solicitor is employed by a for-profit organization, for example, where the employer's name is "Charitable Fundraisers of America". However, nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the

> contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.

Riley, 108 S.Ct. at 2679, footnote 11.

Subparagraph 34.D. of the State's petition clearly alleges that Petitioners have failed to abide by the provisions of Section 407.469.2, RSMo 1986. Whether the solicitor is a third-party professional is important to many prospective contributors, who wish to make the most efficient use of their contributions to purportedly benevolent causes. The State is certainly entitled to an opportunity to prove to the trier of fact that Petitioners illegally refused to announce their professional fundraiser status.

As this Court has stated, commercial speech can permissibly be regulated by way of warnings and disclaimers, if necessary, in order to assure its truthfulness:

> There are commonsense differences between speech that does "no more than propose a commercial transaction." . . . and other varieties. . . .[T]he differences . . . suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.
>
> Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . .They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.

VA. ST. BD. of Pharm v. VA CIT. CONS. COUNCIL, 425 U.S. 748, fn. 24, 771, (1976). The *Virginia State Board* Court asserted further that the First Amendment "does not

prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely." 425 U.S. at 772.

III. The Missouri Supreme Court Denial of Petitioners' Writ of Prohibition is not a "final judgment or decree." Therefore, the United States Court is without jurisdiction to hear this matter.

Petitioners cite *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) for the proposition that, upon denial of their Writ of Prohibition by the Missouri Supreme Court, a "judgment" became "final." To the contrary, this case does not present a "judgment," much less one that is "final." What the Petitioners have been unsuccessful in pursuing to date were "extraordinary writs"; that characterization itself indicates the non-finality of the federal issues at hand, and the interlocutory nature of the ruling of the Missouri Supreme Court.

The Petitioners cite the very passage of *Cox* which defeats their claim that a "final judgment" has already been rendered (Petition for Writ of Certiorari, p. 15): The Georgia Court judgment "is plainly final on the federal issue and is not subject to further review in the state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 485.

The *Cox* court delineated four categories of cases wherein a decision regarding a federal issue was treated as a final judgment for the purposes of 28 U.S.C. Section 1257. In each of these categories, the resolution of the federal issue was, indeed, "conclusive" or "finally

decided" though further proceedings remained to be conducted in the State Courts. *Cox Broadcasting Co.*, 420 U.S. at 479-484.

Certainly, upon this Court's denial of this Petition for Writ of Certiorari, the Petitioners would have every right to a full hearing, at which time they would be allowed to again broach the topics they raise herein. If they were to be unhappy with the judgment rendered by the Missouri trial court, they would obviously have opportunities to appeal to two levels of Missouri Appellate Courts. Then, armed with a legitimate "final judgment," they could properly seek the assistance of this Forum.

Petitioners cite *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Bose Corporation v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) for the proposition that this Court should immediately examine the "whole record" and conclude that there is "no need for a trial" (Petition for Writ of Certiorari, pp. 10, 12). The State is confused by Petitioners' arguments. It is impossible to examine the "whole record" until the case is tried. To further complicate matters, the Petitioners have presented this Court with numerous alleged "facts" not of record in any Court (Petition for Writ of Certiorari, *Statement of the Case*). The *Bose* and *New York Times* Courts admittedly reviewed the "whole record," but such reviews occurred *after* the cases were tried. The State of Missouri deserves the same treatment, i.e., that the "whole record" be developed at trial prior to review by any appellate court. Innumerable questions need to be answered by the trier of fact, especially the question of whether the solicitation conducted by Petitioners was fraudulent, deceitful or misleading. If so,

the speech is not constitutionally protected, and the controversy between Petitioners and Respondent would be entirely within the ambit of the Missouri State Judiciary.

Much work remains to be done in the Missouri Trial Court: Petitioners are under court order to produce answers to Respondent's long-pending discovery. Respondent has also filed a motion to add North American Telemarketing Corporation as a party defendant in this matter. (R.A., B).

CONCLUSION

Petitioners have failed to demonstrate that the Missouri Supreme Court has decided any question of federal law unsettled by this Court, or in conflict with applicable decisions of this Court. Petitioners have also failed to demonstrate the existence of a final judgment or decree. Therefore, the United States Supreme Court lacks jurisdiction to hear this controversy. The Respondent is entitled to an opportunity to prove at trial that Petitioners' solicitation is fraudulent, deceitful and misleading. If the trier of fact were to find in favor of Respondent, Petitioners' speech would not be worthy of Constitutional protection.

Therefore, Respondent respectfully asks that this Court deny the Petition for Writ of Certiorari.

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RESPONDENT'S APPENDIX A

[Excerpts from Respondent's Petition pending at the trial court level]

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

STATE OF MISSOURI, ex rel., WILLIAM L. WEBSTER, Attorney General, Plaintiff,	)	
vs.	)	Cause No. 570822
DAVID JOHN HECKLER, d/b/a THE DAJECK COMPANY, (Serve: 9920 Watson Rd., Suite 209 St. Louis, MO 63126),	)	Team A
and	)	
BOX OFFICE, INCORPORATED, a Missouri corporation, (Serve: Registered Agent: C. T. Corporation 314 North Broadway St. Louis, MO 63102),	)	
Defendants.	)	

APPLICATION FOR TEMPORARY RESTRAINING ORDER, PETITION FOR PRELIMINARY AND PERMANENT INJUNCTION AND OTHER COURT ORDERS

. . . .

27. C. Further, Defendants' sales pitch misleads consumers into thinking that the ticket proceeds will in some manner go to the benefit of various children's groups. When, in fact, no children's groups will financially benefit from the purchase of tickets.

. . . .

29. A. Defendants, through their agents and employees, told Missouri residents "Well, our basic and most popular tickets sponsor seven children for $26.43. If you could help with that ticket it would be that many less children that we have to worry about leaving behind."

. . . .

C. There is no likelihood that a donation of $26.43 will result in seven children actually attending the Defendants' "variety show".

. . . .

G. Defendants knew that most tickets sold by Defendants would not be used to attend the show; therefore, Defendants knew that a purchase of $26.43 in tickets would not cause seven children to attend the show.

H. . . . 3. After such deductions, the remaining proceeds will be divided equally between Box Office, Inc., and the Vietnam Veterans Leadership Program, which will therefore receive less than 20% of all payments made by Missouri citizens to Defendants.

4. The enterprise engaged in by Defendants and the Vietnam Veterans Leadership Program is noted to be non-charitable in nature and intent and is being conducted for profit."

. . . .

31. A. Solicitors of Defendants told and continue to tell consumers that "We'll mail your ticket and brochure tonight. When you receive it in the mail please take a few moments to make out your check for ___ payable to the Vietnam Veterans Ledership (sic) Program. Send it back

because we have a lot of preparations to make and we cannot until we receive your check."

B. In actuality, Defendants are creating a false atmosphere of urgency, in that preparations are minimal and do not depend upon the contribution of money by any particular solicitee.

32. A. Defendants instructed their solicitors to inform the public that their program was "approved by the Attorney General".

B. Defendants' program was not and is not "approved" by the Attorney General of Missouri.

. . . .

34. D. By their refusal to disclose that they are professional fund raisers, Defendants are violating and continue to violate Section 407.469.2:

> "Whenever a solicitation of funds on behalf of a charitable organization is undertaken by a professional fund raiser, the professional fundraiser shall disclose that fact to prospective contributors."

35. A. Defendants informed their solicitors that they may be asked where the solicitees' money will go. Defendants have informed their solicitors that "though I (David Heckler) get a percentage of them (the funds), that is not determined until after the show."

B. David Heckler d/b/a The Dajeck Company receives 50% of all funds given to the enterprise, right off the top, and that is set out clearly in the contract as attached to this pleading.

C. Box Office, Inc. receives 10% of the total intake, right off the top, and that is clearly set forth in the contract, as attached.

. . . .

39. In making the above statements and omissions, Defendants mislead the public into thinking that Defendants are engaged in a charitable enterprise, when, in fact, they are not.

RESPONDENT'S APPENDIX B

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

STATE OF MISSOURI, ex rel., WILLIAM L. WEBSTER, ATTORNEY GENERAL, Plaintiff,	)	Cause No. 570822
vs.	)	Team A
DAVID HECKLER, et al., Defendants.	)	Division 7

MOTION TO ADD NORTH AMERICAN TELEMARKETING CORPORATION AS A PARTY, AND TO FILE AMENDED PETITION

Plaintiff states the following in support of its motion:

1. Plaintiff filed this lawsuit on December 28, 1978.

2. In May, 1988, plaintiff served defendants with Requests for Production and Interrogatories.

3. Despite numerous attempts to compel defendants to provide answers to discovery, plaintiff has not yet received such answers to discovery, plaintiff has not yet received such answers.

4. Independent investigation by plaintiff has revealed North American Telemarketing Corporation to be a necessary party to the just resolution of this controversy.

5. Plaintiff attaches its proposed amended petition, and asks the Court to order the addition of defendant North American Telemarketing Corporation. Plaintiff

further requests leave to file the attached amended petition and to serve summons upon North American.

WILLIAM L. WEBSTER
Attorney General
Erich Vieth /s/
Erich Vieth #29850
Assistant Attorney General
111 North 7th St., Suite 903
St. Louis, Missouri 63101
314/444-6816

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 22nd day of February, 1989 to: Leonard J. Frankel, 100 South Brentwood, 5th Floor, Clayton, MO 63105, attorney for Box Office Inc. and to Donald L. Wolff, 8019 Forsyth, Clayton, MO 63105, attorney for David Heckler.

Erich Vieth /s/

RESPONDENT'S APPENDIX C

[Excerpts from Exhibit A of the Respondent's Petition filed with the State trial court. These excerpts are taken from the contract concerning one of the solicitations giving rise to the present controversy.]

BOX OFFICE, INC.

This Agreement made and entered into this 5 day of November , 19___ by and between BOX OFFICE, INC. a Missouri corporation, hereinafter referred to as "First Party", and St. Louis Vietnam hereinafter referred to as "Second Party", said expression to include the respective parties, successors and assigns: Veterans Leadership Program

. . . .

5. The parties hereto acknowledge and agree that this venture or enterprise is non-charitable in nature and intent and is being conducted for profit. It is further agreed that the parties hereto are not general agents of each other, and this contract shall not be construed by the parties hereto or others as being a partnership agreement or one of a charitable nature or intent.

Said campaign director to receive as his fee 50% of the gross collections of said campaign representing his total compensation.

The First Party shall receive 10% of the gross collections of said campaign to cover all of its expenses

. . . .

14. After deduction of the amounts paid to the First Party and the campaign director as set forth in paragraph

5 and of the items in the Budget of Expense, the remainder of the joint account shall remain intact until the appearance of the show at the specified site at the specified time for the first performance. At such time the remaining items of expenses shall be paid and *the profits shared equally between both parties.*

APPENDIX D

[Excerpts from Exhibit D of the Respondent's Petition filed with the State Circuit Court. These are alleged rebuttals utilized by Petitioners as part of one of their solicitation campaigns.]

Missouri State Firefighters, Missouri State Council of Firefighters, evening rebuttals, use two or more of these each call.

90% of sales comes after answering questions or objections using rebuttals.

1. Too much money: Mr. Jones we're not talking about a lot of money, if you think about it it breaks down to about $3.50 a child and you're helping out three causes, the fire fighters, the St. Louis area and the less fortunate children, so can we count on your support this year?

2. Already called: But just started this campaign, maybe you have confused us with another organization. So we can count on your support this year. If you sound concerned where the money goes, your check is made out directly to the Missouri State Firefighters which fully governs the distribution of the funds, so in this way you can be sure that your support will go where it will do the most good, okay?

3. What percentage goes to the firefighters: We don't know that until after the final show preparations have been made. That is why the checks are made to the Missouri State Fire Fighters and deposited directly into their account so we can count on your support?

4. Already have the ticket: Are those the red, white and blue tickets? (if yes) You must have confused us with

another group because our tickets are orange and white, so can we count on you for that $26.43 ticket?

5. Need information: We really can't afford to send literature to everyone who asks, the reason I'm calling is that we can send out literature only to those people who really want to help us. So, can we count on you for that $26.43 ticket?

7. I don't do solicitations over the phone: I understand your concern Mr. ___, but we mail your ticket before you pay and we ask that you pay via check or money order, making it payable to the Missouri State Firefighters. You can also write for deposit only on the back of the check so no one else can use the money, okay?

8. Unemployed, fixed income: I understand Mr. ___, but we get a lot of support from concerned citizens who are in your position. If you think about it, we're not talking about a lot of money, only $26.43 to send to needy children to the show. Okay?

9. Not interested, disgruntled: I'd be surprised if you are at this point, but Missouri State Firefighters are hosting the show.

10. Gave elsewhere: Well, that means that you are concerned about the community, however, this is an event only done once a year. Without your help many of our fire fighters and fire fighting safety programs would suffer.

RESPONDENT'S APPENDIX E

[From Exhibit C of the Plaintiff's Petition, statement made by David Heckler at solicitor training session concerning the Vietnam Veterans Leadership Program, December 10, 1987.]

"We are talking about collecting 4 million in the next 3 or 4 months. We are not playing a game. . . . Use the volume of your voice to sell the tickets. You don't have to know anything to do this job except this 'shit' [referring to the pitch sheet and rebuttals] . . . 95% of the reasons they [consumers] give you, when they give you a reason other than flat out 'no', are bullshit, I swear to God I trap them [consumers] all the time . . . The sponsor doesn't matter, the kids sell the tickets, the sponsor only enhances it . . . We are not a charitable solicitation. That is the fine line of this job . . . Most businessmen I know spend $50.00 on lunch, ask them for it, I swear to god these kids sell the tickets."